operative one. From 1834 to 1847 it was worked by Messrs Whytock, and the lease was renewed to Messrs Henderson & Widnell after 1847 for twenty-one years, it being at the time a carpet work. The lease is a lease of the premises occupied by Whytock & Co. as a carpet work, with right to use the water for that purpose; and there is a provision "declaring always that they shall not be at liberty to subset the premises after described for any purpose tending to occasion any nuisance to the neighbourhood beyond what the present work may be supposed to do."

The LORD JUSTICE-CLERK—That is the work of Whytock?

The DEAN OF FACULTY—Yes. Now, we have had Whytock's work described; and it appears to me that with the right to use the water of the Esk that clearly gives the right to use it for the purposes of the carpet work.

The LORD JUSTICE-CLERK—Who spoke to the carpet work?

Mr CLARK—Messrs Sutherland & Meikle traced the history of the work from 1834 to 1856.

The LORD JUSTICE-CLERK—I am afraid I cannot give that direction.

The DEAN OF FACULTY—We also ask your Lordship to tell the jury that none of the pursuers is entitled to a verdict against any one of the defenders unless the jury shall be of opinion in point of fact that the matter discharged by such defender into the river pollutes the river within the property of such pursuer to his nuisance.

The LORD JUSTICE-CLERK—That is inconsistent with the law which I gave them. I think you hardly require that if you except to the direction I gave.

The DEAN of FACULTY—We ask that.

The LORD JUSTICE-CLERK—Then I do not give that direction.

The jury, by a majority of nine to three, found for the pursuers the Duke of Buccleuch and Lord Melville on all the issues, and for the pursuer Sir J. W. Drummond on the first, second, third, fourth, and seventh issues.

Counsel for Pursuers—The Lord Advocate, the Solicitor-General, Mr Shand, and Mr Johnstone. Agents—J. & H. G. Gibson, W.S.

Counsel for Defenders—The Dean of Faculty, Mr Young, Mr Clark, Mr Gifford, Mr Moncrieff, and Mr Asher. Agents—White-Millar & Robson, S.S.C.

HOUSE OF LORDS.

Friday, July 13.

WHITE AND ANOTHER *v.* EARL OF MORTON'S TRUSTEES.

(In Court of Session, 24 D. 116 and 1054.)

Process — Jury Trial — Application of Verdict — Appeal to House of Lords — Competency. Issues were adjusted to try whether there existed two rights of way "*by or near*" a certain line, and the defender put in a minute consenting to a verdict for the pursuers, and another consenting to judgment in the same way as if a verdict had been found for the pursuers. The Court, when asked to apply the verdict, remitted to a surveyor to lay off and mark on a plan the footpaths so consented to, so as to make them least burdensome to the defender. This was done with the acquiescence of the parties, and three other interlocutors were afterwards pronounced carrying out this course of proceeding. The three interlocutors being appealed, Held (1) that the Court of Session had acted *ultra vires* in pronouncing the first interlocutor; and (2) that as the case had been so taken out of the *cursus curiæ* by consent of parties, the appeal against the others could not be entertained.

Process—Abandonment of Action. Held (aff. C. of S.) that a minute of abandonment under 6 Geo. IV., c. 120—(1) is incompetent before the record is closed; (2) must include the whole action and not a part of it only; and (3) must be perfected by leave being granted to abandon after payment of expenses.

Process—Implied Abandonment of Action in Part. Pursuers of an action of right of way claimed in the record as closed a right to five roads, but lodged issues as to only two, and obtained a verdict in their favour. Held that the defender was entitled to absolvitor in regard to the other three, but observed that this absolvitor would not found a plea of *res judicata* against the general public, as there never had been any adjudication of the question.

Expenses. An appeal to the House of Lords dismissed without costs because the parties had been "led astray" by the Court below.

This was an appeal against six interlocutors of the Second Division of the Court of Session in an action originally raised on 29th April 1846, at the instance of James Morris Anderson, Robert Hay, James White, Robert Campbell, and John Robertson, all inhabitants of Aberdour, against the late Earl of Morton. James White and Robert Campbell were now the only appellants, the other pursuers being dead, and the respondents were the Duke of Buccleuch and others, Lord Morton's trustees.

The summons concluded for a declarator of right of way in regard to five different roads betwixt Aberdour and Burntisland. Defences were lodged for Lord Morton, and thereafter the parties made up a record by condescendence and answers, which were revised. The process thereafter lay over from 1847 to 1851, when it was wakened, and on 4th March 1851 parties were appointed to adjust their respective papers. On 4th March 1851 the following minute was lodged for the pursuers:—

"Deas, for the pursuers, stated that he abandoned the cause, in so far as it related to the rights of way or footpaths described in articles 2d, 3d, and 5th of the revised condescendence, reserving the pursuers' right to bring a new action relative to the roads and portions of the cause thus abandoned, in terms of the statute 6 Geo. IV., c. 120, and relative Act of Sederunt, without prejudice to the pursuers' right to proceed with the said cause as regarded the whole other matters and roads involved therein as accords."

On this minute being lodged, the Lord Ordinary appointed the defender "to give in an account of expenses relative to the part of the cause now abandoned," and remitted it to the auditor to tax and report. No account of these expenses was however lodged by the defender.

The action then proceeded, and parties having adjusted their respective papers, the record was closed on 31st May 1851. The closed record contained averments in regard to all the rights of way originally claimed.

Issues were thereafter ordered and lodged, and on 18th July 1854 were approved of as adjusted by

the Second Division. The issues so adjusted had reference to only two of the roads and rights of way claimed in the summons.

On 21st October 1854 Lord Morton lodged this minute :—"The defender consents to a verdict for the pursuers on the issues in this cause;" and he afterwards lodged this other minute :—"The defender consents to judgment in the same way as if a verdict had been found for the pursuers on the issues in this cause."

The pursuers thereupon moved the Court to hold the former of these minutes as equivalent to the verdict of a jury upon the issues in their favour, to apply the same, and to find, decern, and declare, *quoad* the rights of way mentioned in the issues, in terms of the conclusions of the summons.

About the same time a note was lodged for Lord Morton in which he stated that, "now that a right of path or road has been conceded, it is necessary, as the public are using a path, that, for the protection and use of the defender's property, the footpaths be judicially defined and laid off," and he therefore moved the Court to remit to Mr H. J. Wylie or some other person to lay off a line of footpath and report thereanent.

On 22d December 1854, the Court remitted the note for Lord Morton, with the issues and minute consenting to a judgment in terms thereof, to Mr Wylie, "with directions to him to lay off and mark on the ground, and also on the plan prepared by him, the footpath so consented to, with the entrances to the same, in such manner and in such a line, as to make the footpath least burdensome to the defender, and so as to interefere as little as may be with the use and occupation of the ground by the defender, and at the same time so as fully to answer the right of a footpath between the places mentioned in the issue, and without interference with that right of way." This interlocutor was not appealed from.

Mr Wylie made an *interim* report, and on 6th March 1855, the Court having considered it and heard counsel, "Find in regard to the first two heads of the said report that the reporter must proceed to lay off the footpath from the point of entrance, and along the line of footpath described in the issues and denoted by the red line on his plan; (3) remit to Mr Wylie to lay off a footpath of the width generally of five feet, but making provision for greater width at such places where the nature of the ground may appear to the reporter to render such additional width proper; (4) find that the pursuers are not entitled to a footpath separate from the cart road described under the fourth head of the *interim* report; (5) find that the pursuers are not entitled to a footpath separate from the cart road described in the fifth head, but remit to the reporter to continue the footpath across to the ground of the Carron Company." This was the *first* interlocutor appealed from.

Mr Wylie having again reported, the Court, on 22d November 1856, having considered it, "in respect that no objections have been stated thereto, approve of the said report and relative plan, which has been subscribed by the President of this Division of the Court with reference hereto; and in terms thereof, and in respect of the minute for the defender No. 728 of process, find the pursuers entitled to public footpaths through the defender's grounds between Aberdour and the Carron Company's ground at Starlyburn, in the lines and of the breadth fixed in the said report, and marked on the said plan by the line coloured with a light red colour." This was the *second* interlocutor appealed from.

At this stage of the process Lord Morton died, and the action having been transferred against his trustees, a motion was made by the pursuers that the defenders should be ordained "to remove all obstructions to the free use of the rights of way or footpaths as now established." This motion was opposed by the defenders, and on 5th December 1861 the Court refused it. This was the *third* interlocutor appealed from.

On 29th January 1862 the pursuers moved the Court to dispose of the remaining conclusions of the summons, and to find them entitled to expenses. After hearing parties on this motion, the competency of the pursuers' minute, lodged on 4th March 1851, having formed part of the discussion, the Court on 21st May 1862 pronounced this interlocutor :—"The Lords having heard counsel upon the minute No. 52 of process, find the same incompetent, and appoint it to be withdrawn." This was the *fourth* interlocutor appealed from.

With the view of meeting the views of the Court, and obviating the objection taken to the former minute of abandonment, that it had been lodged *before* the record was closed, the pursuers then lodged a new minute in precisely the same terms as the one lodged eleven years before; and on advising it and hearing parties on the whole conclusions of the summons hitherto undisposed of, the Court, by interlocutor dated 6th June 1862, "Find that, in the present state of the process, the pursuers are not entitled to abandon, in terms of the said minute: Find, decern, declare, and interdict, in terms of the declaratory and prohibitory conclusions of the summons, as regards the footpaths laid down on Mr Wylie's plan No. 746, and settled by the interlocutor of 22d November 1856, to be the footpaths to which the public are entitled through the lands of the defenders: *Quoad ultra* assoilzie the defenders and decern." The pursuers were found entitled to expenses incurred by them prior to 19th July 1861, subject to modification; and these expenses were afterwards taxed at £889, 13s. 10d., and on 28th February 1863, modified by the Court to £750. These were the *fifth* and *sixth* interlocutors appealed from.

The pursuers urged the following

REASONS OF APPEAL.

I. Because the right of the pursuers to the footpath, in the red line marked on the plan No. 424 of process, was judicially established by the defenders' minutes of consent to a verdict, and to a judgment as if a jury had returned a verdict for the pursuers on the issues, and the Court had no right or power afterwards to deprive the pursuers of the use of any portion of this footpath.

II. Because the solum, over which the right of way was established, was dedicated as a footpath to the public by the defender and his ancestors, and the defender had no right to interfere with that dedication, or with the use and exercise by the public of the right of way so acquired by them.

III. Because the pursuers were entitled to enjoy the right of way, established in favour of the public, free from all interruption, and the Court ought not to have refused them an order or decree compelling the defenders to remove the obstructions which they had placed across the line of the footpath.

IV. Because the pursuers were entitled to abandon the action in so far as it related to the footpaths described in the 2d, 3d, and 5th articles of their condescendence, under reservation of a right to bring a new action, and they did regularly and

competently abandon the same, with this reservation by the minute of 4th March 1851.

V. Because, if the minute of 4th March 1851 had been irregular or incompetent by reason of its having been lodged *before* the record was closed, the minute of 26th May 1862, lodged *after* the record was closed, would have been regular and competent, and ought to have been sustained or given effect to.

VI. Because the pursuers, having succeeded in vindicating the public right of way resisted by the defender, ought to have been found entitled to their full expenses of process, and they ought not to be deprived of the expenses properly incurred by them subsequent to 19th July 1861; and

VII. Because there were no grounds for a modification of the expenses incurred previous to the said 19th July 1861, as these were taxed by the auditor, and the Court ought not to have reduced these taxed expenses from £880, 13s. 10d. to £750.

The defenders stated the following

REASONS OF APPEAL.

I. Because the representatives of John Robertson and Robert Hay ought to have been made respondents in the appeal, at least in so far as the interlocutors appealed against relate to the expenses incurred in the Court below; and this not having been done, the appeal is irregular, defective, and incompetent, and cannot be insisted in or proceeded with by the appellants.

II. Because the appellants were not entitled to a footpath separate from the cart road between the points referred to in the fourth finding of the interlocutor first appealed against, their claim as set forth in the record being for a cart road, and they having acquiesced in an interlocutor directing the footpath to be laid off in the line least burdensome to the proprietor.

III. Because the appellants not having objected to Mr Wylie's final plan, fixing the line of the footpath with the entrance thereto, but having allowed the Court below to pronounce the interlocutor dated 22d, signed 29th November 1856, approving of said plan, without stating any objections, and having consented to and acquiesced in the said interlocutor, and used the path under it for a number of years without complaint, are now barred from challenging the said interlocutor, and the appeal, in so far as directed against it, is therefore incompetent.

IV. Because in the circumstances the appellants were not entitled to demand the removal of the gates complained of by them, and because these gates are not obstructions to the use of the footpath.

V. Because it was incompetent for the appellants to abandon the action, in whole or in part, before the record was closed, and after the record was closed to abandon it in part.

VI. Because the appellants were not entitled to abandon, either in whole or in part, after the cause had been exhausted by approval of the issues for trying the cause, and the procedure which followed thereon.

VII. Because in any event the appellants were not entitled to any of the paths or roads originally claimed by them, with the exception of those which they put in issue, and their right to which was conceded by the late Lord Morton—at least, the said paths or roads having been so conceded, the appellants were not and are not entitled to any additional paths or roads.

VIII. Because it is incompetent, in the circumstances of the present case, to appeal on the question of costs, and the appellants are precluded from doing so by having accepted payment of the costs to which they were found entitled in the Court below.

IX. Because the appellants were not entitled to costs, beyond the amount awarded to them by the Court below.

X. Because the interlocutors complained of are, in all respects, well founded.

ANDERSON, Q.C., and C. G. WOTHERSPOON appeared for the appellants, and

ROLT, Q.C., and DAVID HALL for the respondents.

Judgment was given to-day.

The LORD CHANCELLOR (CHELMSFORD)—My Lords, this is the case of an appeal against six interlocutors of the Second Division of the Court of Session, and in the course of the argument your Lordships indicated a very strong opinion that as to four of the interlocutors the appeal was incompetent. With the permission of your Lordships I will state the grounds upon which I conceive that opinion is well founded. The Summons of Declarator claimed five several rights of public way, all of which, with the exception of one of them, it is unnecessary to specify. With respect to that one, a right of public footway was claimed from "the old Village to the Harbour of Aberdour and to the Burgh of Burntisland, leading from the South Street or Kirk Wynd of the old Village of Aberdour and thence through several other places to the other terminus past Starly Burn and Starly Burn Harbour to the Kirk Town of Burntisland, and from thence to the Burgh of Burntisland as aforesaid."

On the 4th of March 1851 the pursuer as to three of those roads gave in a Minute of Abandonment, which will be the subject of future consideration, and the cause was therefore restricted to the two remaining roads. Issues were adjusted, which appear to have been the subject of very considerable discussion, because Lord Cowan says that "there were no less than five editions successively proposed by the pursuers." Now it is most unfortunate that after such anxious consideration and discussion as to the form of the issues the only one of them to which it is necessary to direct your Lordships' attention should have been framed in the manner in which it has been.

The second issue (page 84) is "whether, for the said period of forty years or for time immemorial, there existed a public right of way or branch foot road for foot passengers, leading by or near the broad red line as shown on the plan No. 424 of process from the Kirk Wynd of the Old or Easter Village of Aberdour in a southerly direction along the eastern side of what is known as the Mill Meadow to or near the Teinds Barns." I need not go further. It is only necessary to advert to that particular portion of the issue. That issue is framed in the alternative. Whether, if the cause had gone to trial, the jury would have been restricted to the exact terms of this issue, and must have found in these terms, or whether it would have been competent for the jury to determine that the line of road was "by" the red line marked on the plan, or "near" the red line marked on that plan, in a particular direction, may be a question of doubt. But, at all events, it is unnecessary to determine that question, because the defender consented to a verdict in these terms—"The defender consents to a verdict for the pursuers on the issues in this cause." All the consent that was given by the defenders was, that "there existed a public right of way or branch foot road for foot passengers

leading by or near the broad red line;" whether that road lay "by" or whether it lay "near" was left undetermined, and it was difficult to say what was the proper course which the pursuers ought to have adopted under the circumstances.

A motion was made to the Court to apply that verdict. Now, the only power the Court had, as it appears to me, in applying that verdict, was to apply it in the terms to which the consent itself was applicable. If that left the matter uncertain, whether it was competent to the pursuers under the circumstances to have applied for a fresh issue by which the matter might have been precisely determined, or whether they might have had a new summons of declarator to ascertain whether the road was "by" or whether it was "near," and how "near" the red line, may also be matter of much doubt and difficulty. But at all events the duty of the Court in applying the verdict was clear and plain. It is just possible that the Court might have had the power (I do not say that they would have had the power) to refer it to Mr Wylie or some other person to ascertain what was the line of public footway which the public had been accustomed to use for the last forty years. But the Court adopted a very different course, and did that which was most unquestionably *ultra vires*, for they pronounced this interlocutor:—They "remit the case, with the issues and minute consenting to judgment in terms thereof, to Mr H. J. Wylie, with directions to him to lay off and mark on the ground, and also on the plan prepared by him, the footpath so consented to, with the entrances to the same, in such manner and in such a line as to make the footpath least burdensome to the defender, and so as to interfere as little as may be with the use and occupation of the ground by the defender, and at the same time so as fully to answer the right of a footpath between the places mentioned in the issue, and without interference with that right of way."

The Court, that is to say, the Second Division, had no power whatever to direct a road to be laid out equally convenient with that to which the public were clearly entitled. They have adopted this course—they have not given the public any way which they had been accustomed to use; but they have consulted the convenience of the defender, and they have directed Mr Wylie to ascertain a road which will be equally convenient to the public with that to which they were entitled, and not inconvenient to the defender.

There is no doubt whatever, therefore, that in this interlocutor the Court having proceeded *ultra vires*, all the subsequent interlocutors which were founded on this as their basis, were taken out of the judicial course, were no longer matter of judicial consideration, and consequently that they were not a subject of appeal. Therefore the opinion which was expressed by your Lordships during the course of the argument must be perfectly well founded, that all those appeals must be incompetent which relate to the particular interlocutors which proceed on this interlocutor of the 22d December 1854, against which, as your Lordships will observe, there is no appeal at all. That interlocutor being consented to, all those appeals must be incompetent.

My Lords, the only remaining question therefore, relates to the two interlocutors which involve the question as to the minute of abandonment, upon which, undoubtedly, there appeared to be some difficulty during the course of the argument, but it is one which, on consideration, it seems to me may be very easily determined. The minute that was originally given in on the 4th of March 1851 was in these terms?—"Deas, for the pursuers, stated that he abandoned the cause in so far as it related to the rights of way or footpaths described in articles 2d, 3d, and 5th of the revised condescendence, reserving the pursuers' right to bring a new action relative to the roads and portions of the cause thus abandoned, in terms of the statute 6 George IV., chapter 120, and relative Act of Sederunt, without prejudice to the pursuers' right to proceed with the said cause as regarded the whole other matters and roads involved therein, as accords." Upon that there was an interlocutor by the Lord Ordinary of the 7th March 1851, in these terms—"The Lord Ordinary having considered the minute by which the pursuers abandon this cause in part, appoint the defender to give in an account of expenses relative to the part of the cause now abandoned; and remits the account thereof, when lodged, to the Auditor to tax the same, and to report; and *quoad ultra* continues the cause till to-morrow."

Now, it must be observed in passing, that that minute of abandonment was never perfected, because, according to the practice which is laid down in Mr Shand's book (a book of authority) upon this interlocutor of the Lord Ordinary, there should have been a payment of expenses which he directs to be ascertained. He refers it to the Auditor "to tax the same and report." Those expenses should have been paid, and then the next step to be taken by the pursuers should have been to obtain an interlocutor of the Lord Ordinary that "in respect the expenses due to the defender had been paid, allows the pursuer to abandon this cause, dismisses the action, and decerns with the expense of extract." Nothing of that kind was done, and therefore at the time of the closing of the record, which was on the 31st of May 1851, there was no complete abandonment of these causes of action.

Then in 1862 a new minute was given in, both of these minutes being dealt with, in the manner which I shall presently describe, by the Court. That minute, the date of which is the 26th of May 1862, is exactly in the terms of the former minute of 1851. Now, it may be observed, with regard to this minute, that it was only under the statute of the 6th of George IV. that such a minute could have been given in at that time when the record was closed, and the statute of 6th George IV. only gives power to a pursuer to abandon the whole cause of action. But this was an abandonment only of a part of the cause of action, and therefore on that ground, as it appears to me, it wa sincompetent.

But the Court dealt with both these minutes of abandonment. First of all, in a judgment of the 21st of May 1862, with regard to the first, the minute of 1851, the Lord Justice-Clerk says it "contains an incompetent proposal," which I understand to mean that it was incomplete—that it was a mere proposal—that it was never carried into effect by a proper allowance of the abandonment after the payment of the expenses; and the rest of the Judges are of opinion that an abandonment of an action under the statute (and this professes undoubtedly to be an abandonment under the statute) is only competent after the record is closed. With regard to the other minute of 1862, Lord Cowan deals with it in this way. He says, after the issues had been adjusted between the parties—"When the questions embodied in these issues were disposed of I think there was an end of the whole cause embraced under the conclusions of this summons. By the

adjustment, and by the interlocutor which followed in the terms mentioned, I think there was a virtual departure from and abandonment of every other ground of action than was embodied in these two issues." Then he ends by saying, "I think we ought to dispose of the minute of abandonment on the special ground that there is nothing to abandon, and that therefore it must be withdrawn from process."

Now, my Lords, without entering into a consideration of whether there can be a part abandonment of a cause, or whether there can be an abandonment of a cause before the record is closed, I think your Lordships may decide in favour of these interlocutors upon a distinct and specific ground which is applicable to this particular case. The minute of abandonment of March 1851 was incomplete, as I have shown, at the time when the record was closed; but the record was closed in these terms on the 31st of May 1851. The interlocutor is—"Declares the record to be closed on the adjusted revised condescendence for the pursuer, No. 9, and the adjusted revised answers, No. 50 of process." Now, my Lords, there can be no doubt at all that the record was closed, with respect to the five roads stated in the revised condescendence, and forming, therefore, part of the record, and that it was absolutely necessary for the Court to dispose of those claims upon the record which were made by the pursuer, because they were not withdrawn from the record. Although practically the case was confined to the trial of the issues with regard to two of the roads, still those claims remained upon the record, and it was absolutely necessary for the Court to dispose of them. Now, in order to dispose of them, the Court considered it necessary, first of all, to direct the minute of March 1851 to be withdrawn, and afterwards, in their interlocutor of 6th June 1862, to find that the pursuers were "not entitled to abandon, in terms of the said minute." These minutes being out of the question, the claims as to those three roads had to be disposed of, and the only mode in which they could possibly be disposed of, as there was no evidence in support of them, and as they were not withdrawn, was to enter an absolvitor for the defender; and therefore the Court directed that absolvitor to be entered.

My Lords, I was a good deal struck by the observations which were made by my noble and learned friend (Lord Westbury), in the course of the argument, as to the danger which might arise to the public, supposing this interlocutor were to stand, with an absolvitor of the defenders, because it might then be said that that would entirely exclude the public from any future claim with respect to these rights of way. I have very great doubts whether that would be the effect of it. Supposing any future claim to be made in respect of these roads, I doubt very much whether the public would be excluded by this interlocutor. I think it would be quite competent to the party prosecuting such a claim to show the circumstances under which that interlocutor was pronounced, and, undoubtedly, if the circumstances could be shown, it never could be said that it was binding against the public.

Under these circumstances I submit to your Lordships that this interlocutor is perfectly correct. But a question may arise (probably your Lordships may have thought of it) as to what ought to be done with the costs in this case. It appears to me (I say it with very great deference to the learned Judges) that they have led the parties completely astray. They ought not to have gone on judicially to pronounce those several interlocutors which have been declared to be incompetent. They necessarily, and, as I venture to say, improperly, kept the parties before them when the parties themselves had proceeded in a way which took the case out of the jurisdiction of the Court. Under these circumstances I submit to your Lordships that in dismissing this appeal we ought to dismiss it without costs.

Lord CRANWORTH—My Lords, I entirely concur with my noble and learned friend in the conclusion at which he has arrived in this case. When the jury had returned a verdict—for we must consider it as if they had returned a verdict—that there was a right of way "by or near the red line," it was patent that the Court had got a finding that *per se* could not be applied. How were the Court to deal with this? It is not necessary for me to say—indeed, I should feel myself at a loss to say exactly—what, according to practice, ought to have been the course pursued. It is plain that issues had been directed which did not exhaust the subject. How was that to be supplied.

The best way to put it for the appellants is this—to treat it as a finding—as no doubt it was a finding—that there was in some direction or other a public right of way from the one point to the other. That was found by the jury; the precise line was not found. I do not say that it was open to the Court, but perhaps it was open to them, to have then put it in some course of inquiry, either by reference to Mr Wylie or by some other mode, to ascertain what was the course of the public right of way—whether along the red line, or if not along the red line, how far and in what direction diverging from it. If that had been done, whether it was the proper course or not, it might have led at least to an ultimate finding upon that which was the point really to be decided—namely, what was the line of the public right of way. If that had been done, I think if an interlocutor had been made upon that subject, it might have been right or it might have been wrong, but it would have been upon a totally different footing for us to consider from what it is at present. But what the Court did was to direct an inquiry which upon no possible ground could they have a right to direct—namely, an inquiry, or rather a reference, to Mr Wylie, telling him not to ascertain what the line was, but to make out a new and convenient line as little as possible burdensome to the defender. That might be, by way of arrangement, an extremely convenient course to pursue, but it immediately took the whole proceeding out of the ordinary *cursus curiæ*, and therefore it was incompetent afterwards for the parties to appeal against anything that was done in pursuance of that reference. That is the ground upon which my noble and learned friend has rested his view of the case upon the merits, and I entirely concur with him in the conclusion which he has arrived at on this the first point in the case.

My Lords, with regard to the second point, it has always been the rule of your Lordships' House to be as slow as possible to interfere with anything that is mere practice. What really was the case here was this:—The parties having entered this minute of the 4th of March, abandoning the cause *quoad* the three roads, the record is afterwards made up, containing the whole of the condescendence and the whole of the answers, embracing all the five roads. I fully enter into the

feeling of the Court, therefore, that when the cause came finally to be disposed of, and they were bound to make a deliverance as to the whole, it was necessary for them to treat the record as they found it; and the result being, in their view, that there was a proper finding, or a proper disposal of the case as to the two roads, but no proof at all having been given by the defender as to the three other roads, the absolvitor was a necessary consequence.

My Lords, I confess I do not feel apprehensive as to any effect which this decision will have upon any of the public who may hereafter assert such a right, because I consider that it is perfectly clear that even if such a decree as this can be given in evidence, it can be conclusive only if upon the face of it it shows that there has been an adjudication. But upon the face of this decree it would appear that there has been no adjudication.

I also think that the proposal which my noble and learned friend has made to your Lordships with regard to the costs of this appeal is a right one; because, after all, it is an error on the part of the Court which has led the parties into taking the course which they have taken. Therefore I concur with my noble and learned friend that the appeal should be dismissed without costs.

Lord WESTBURY—My Lords, I entirely concur in the conclusion at which my noble and learned friends have arrived. From the moment that the consent of the parties to a verdict, and afterwards to a judgment upon the inartificially framed issue, was substituted for a regular proceeding, this cause was taken out of the ordinary and regular course of judicial procedure. No doubt the original issue was inartificially framed, but it contained within it materials for answering by the jury two questions—one, whether there was a road along the red line? the other, if not along the red line, whether there was a road along any other and what line?

The verdict that was taken by consent, or rather the judgment, was a simple affirmative to that issue—an affirmative, therefore, which could not be applied to either one of the questions. In reality the issue ought to have been directed to be tried, and the insufficiency of the consent ought to have been observed. But, instead of that, the Court have endeavoured to correct the error, and to supply the defect by taking a course which certainly was not within their judicial authority, but which, not having been complained of by either party, must be attributed entirely to the consent of the parties. What the Court did was embodied in the interlocutor of the 22d of December 1854, and that is certainly not a deliverance in pursuance of any judicial power, it is nothing in the world more than an embodiment of certain terms, which may have been approved of by the Court, and which appear to have been acquiesced in by the parties.

Now, that was the basis of all that was subsequently done—a basis constituted of the *consensus* of the parties, and not of the exercise of any judicial authority. It is impossible to interfere with that—it rests upon matters which are not brought before us, and which we cannot remove. Therefore, that standing, all that subsequently follows is an emanation of the original agreement to take this matter out of the ordinary path of judicial determination. On that ground, therefore, my Lords, the appeal is wholly incompetent, or rather it is one which we are incapable of entertaining. We cannot apply the ordinary rules of law to proceedings based on an order which is utterly at variance with the ordinary rules of law.

Now, with regard to the other point, undoubtedly I entirely concur in this, that full credit must be given to the Judges of the Court below with regard to a mere matter of practice, unless we are enabled to ascertain, in a manner which admits of no possible doubt, that there has been a miscarriage in the application of their rules of practice. But, in this respect, though originally I felt some anxiety and doubt on the point, I am now satisfied that there has been no miscarriage in point either of substance or of form. It was undoubtedly competent, I apprehend, by the law and practice of Scotland, to the pursuer, anterior to the closing of the record by minute (and also by amendment), to have restricted the conclusions of the summons in his action, provided that minute was so dealt with by the pursuer as to become an irrevocable thing, and to accompany the summons in such a manner as that, when the record was closed, it might plainly appear to be closed upon that restricted summons. But without entering further upon that, what was done by the appellant was different from that course of procedure altogether. It is true he delivered in a minute in March 1851, to which I abstain from giving any kind of designation, because there has been a controversy as to whether it contains the necessary elements of a minute of restriction or not; but even if it was a minute of restriction, the course taken by the appellant afterwards was one which certainly justifies the form of the interlocutor which was finally pronounced, because it is plain that the appellant thought proper to demand judgment upon the summons, which, so far as the closed record is concerned, appears to be unrestricted upon the whole of the pleadings, which pleadings were addressed to the five rights of road that were the subject of the original cause of action. The result was that on the record so made up and closed unquestionably the defender was entitled to an absolvitor from that which was disproved and from that also which had been abandoned.

My anxiety at first was lest the form of absolvitor should involve in it an apparent conclusion that the question had been tried and determined on its merits. But I think we ought not to permit any doubt of that kind to interfere with the ordinary form of judicial expression of interlocutors in Scotland, because I must take it for granted that these interlocutors are so worded that the real truth of the nature of the absolvitor might be easily ascertained upon an examination of the interlocutor, or of the matters on the record in a process to which that interlocutor would naturally open the door for investigation or proof.

On these grounds, therefore, my Lords, I entirely concur with my noble and learned friend that there is no reason to alter the form of the interlocutor in that respect, and that this appeal must fail. But inasmuch as it fails in consequence of there having been a common understanding to pursue a path which was a by-path, and not the ordinary judicial highroad, I think, as that has been the result of agreement, it would be hard to dismiss this appeal with costs by reason of our being incompetent to deal with matters which both parties seem to have supposed that we should be competent to deal with. Therefore I approve entirely of the motion proposed by my learned friend to be submitted to your Lordships, that the last interlocutors should be affirmed, and the petition of appeal dismissed without costs.

The following question was then put:—

That the interlocutors of the 21st May 1862, the

6th June 1862 and the 28th of February 1863, be affirmed, and the appeal dismissed without costs.

Lord WESTBURY—Would your Lordships allow me to suggest that our intention is to affirm those interlocutors which discharge the minute and grant the absolvitor; but inasmuch as it is not competent to the House to entertain the appeal upon the first interlocutors, it would be incompetent to the House to affirm those interlocutors. I would therefore, with submission to your Lordships, suggest that your Lordships should dismiss without costs the appeal as to all the interlocutors, except the interlocutors discharging the minute and granting the absolvitor, but affirm those last interlocutors, the appeal in respect of those interlocutors also being dismissed without costs.

Lord CRANWORTH—I think that would be very much the effect of the question as it was put by my noble and learned friend on the woolsack. The principle is that we do not affirm those interlocutors which we think were grounded upon the original interlocutor of December 1854, which took the case out of common *curus curiæ*. We do not reverse them and we do not affirm them; we are not competent to deal with them.

Lord WESTBURY — Those interlocutors were emanations from the consent of the parties, and from the consent of the parties alone can they derive any authority. Therefore they are no affirmed.

Lord CHANCELLOR—I believe the result of the way in which I put the question to the House is precisely what your Lordships have suggested—namely, that we take no notice at all of those interlocutors upon which the appeal is incompetent; but with regard to the other interlocutors, we affirm them, and dismiss the appeal without costs in respect of the whole.

Certain interlocutors affirmed, and appeal dismissed, but without costs.

Agents for Appellants—Wotherspoon & Mack, S.S.C., and Simson & Wakeford, London.

Agents for Respondents—Webster & Sprott, S.S.C., and William Robertson, London.

COURT OF JUSTICIARY.

AUTUMN CIRCUITS.

DUNDEE.

(Lords Cowan and Jerviswoode presiding.)

H. M. ADVOCATE *v.* RICHARDSON AND DAVIDSON.

Process—Indictment—Amendment. A public prosecutor is not entitled, without consent of the panel, to delete a portion of an indictment, if the deletion may cause an alteration in the substance of the charge.

George Richardson and Samuel Davidson were charged with theft, in so far as (1) "You, the said George Richardson, having during the period betwixt the 1st day of November 1863 and the 8th day of August 1866, been in the employment of the company of James Keiller & Son, confectioners at or near Meadowside, in or near Dundee, as manager of the hard confectionery department of their business within their works at Meadowside aforesaid, and thus having opportunities and facilities of stealing articles from said works without immediate detection; and you, the said Samuel Davidson, being in the knowledge of these opportunities and facilities, you, the said George Richardson and Samuel Davidson did, both and each or one or other of you, during the period betwixt the 1st day of January 1864 and the 31st day of July 1866, and on or about the respective dates set forth in the first column of the inventory No. 1, hereunto annexed and referred to, from or near the said works at or near Meadowside aforesaid, then, and now or lately occupied by the said James Keiller & Son, wickedly and feloniously steal and theftuously away take thirty-three or thereby casks or barrels. . . . . each cask or barrel containing sugar *and sugar dust*, or sugar sweepings, or a mixture of sugar *and sugar dust*, or sugar sweepings, the contents of each of the said casks or barrels being more particularly to the prosecutor unknown." Four others charges of a like nature followed.

MILLAR, A.-D. (with him PETTIGREW WILSON) proposed to delete the words "sugar dust," occuring in the indictment.

GUTHRIE SMITH, for Davidson, objected, on the ground that the proposed deletion was an alteration of the substance of the charge, and cited Hume, ii. 281, and the case of Kermath, June 4, 1860, 3 Irvine, 602, as authorities for holding that the deletion could not be made without the consent of the panel.

The Court sustained the objection.

LORD COWAN—I do not, as some of my brethren do, go so far as to hold that no alterations can be made on the libel without the consent of the panel. But when the alterations touch matters of substance, or are such as to make it clear that they may be alterations in the substance of the charge, I entirely concur with the remarks of Baron Hume in the passage quoted to us.

LORD JERVISWOODE—I am of the same opinion.

Thereupon the Advocate-Depute deserted the diet *pro loco et tempore*.

Agents—Paul & Thain, writers, Dundee.

H.M. ADVOCATE *v.* GEORGE FLEMING.

Res judicata. A panel was libelled before a Sheriff Court, and an objection was taken to the relevancy of the libel and sustained, whereupon the diet was deserted. He was thereafter indicted for the Circuit Court, and the indictment contained portions of the libel which had been found irrelevant in the Sheriff Court. Plea of *res judicata* repelled.

Libel—Relevancy—Culpable Homicide. A panel was charged with culpable homicide, in consequence of a horse under his charge having been left unattended, and having started off and killed a passer-by. Objection to the relevancy of a statement in the indictment that the horse had a few days before started off when left unattended by the panel, on the ground that there was no averment of culpability or danger on the latter occasion, repelled.

George Fleming was charged with the crime of culpable homicide in so far as, on the 2nd day of July 1866, or on one or other of the days of that month, or of June immediately preceding, "you the said George Fleming having under your charge a spring-cart or other vehicle drawn by a single horse, and having halted the said horse and spring-cart or other vehicle at or near the shop in or near North Port, in or near Arbroath, then and now or